No. 158. 90.

Brf. of Call for D. C.

FILED
DEC 17 1900
JAMES H. MCKENNEY
Clerk.

Filed Dec. 17, 1900.

SUPREME COURT

OF THE

United States.

OCTOBER TERM 1900

No. 158

The Southern Pacific Railroad Company,
Plaintiff in Error,
vs.
Isaac T. Bell,

Error to the Supreme Court of the State of California.

BRIEF FOR DEFENDANT IN ERROR.

By JOSEPH H. CALL.

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Statement.

On August 9, 1897, the Southern Pacific Railroad Company filed its complaint in the Superior Court of Fresno county, California, against Isaac T. Bell, by which it sought a decree adjudging it to be the owner of the northeast quarter of section seven, township seventeen south, range sixteen east, Mount Diablo Meridian, and that it be adjudged that the defendant holds the legal title of said land in trust for the plaint-

iff, and requiring him to convey the same to the plaintiff. (Record 2–6.)

The plaintiff claimed title to this land by virtue of section 18 of the Act of Congress of July 27, 1866, (14 Stat. 292) and amendments of that act, as land granted to it to aid in the construction of a railroad from the bay of San Francisco, to an intersection with the Atlantic & Pacific Railroad.

The complaint shows that the tract of land sued for is outside of the granted limits of the grant to that company, and more than twenty miles from its line of road, but within the indemnity limits of the grant. (Record 4.)

From the allegations of the complaint it appears that on September 15, 1892, the United States issued a patent in due form of law to defendent Bell for this land, presumably under the settlement laws, in as much as cash entries of land were not then permissible. (Record 5.) And it further appears that nearly a year *thereafter*, and on July 26, 1893, the Southern Pacific Company first made application to the Interior Department to select this land as indemnity (Record 5), and at which time the full legal title to the land had passed out of the United States and to defendant Bell.

To this complaint the defendant demurred, under the California Code, upon the ground, among others, "that said complaint did not state facts sufficient to constitute a cause of action." (Record 6.)

The demurrer having been sustained and the plaintiff having neglected and refused to amend the com-

plaint, final judgment was entered against the plaintiff and in favor of the defendant. (Record 6, 7.)

Upon appeal by the plaintiff to the Supreme Court of California the judgment of the Superior Court of Fresno county was affirmed, upon the authority of Southern Pacific Company v. Wood, 124 Cal. 475, 481 (57 Pac. Rep. 388) (Record 8-18.)

The Supreme Court of California unanimously reached the conclusion that no title or right could attach in the railroad company to indemnity land until it had been selected and such selection *approved by the Secretary of the Interior*, and until so selected the Land Department could properly and lawfully issue a patent to another, which would defeat such right of selection by the company, relying upon the decisions of this court in Wisconsin Central Railroad Company vs. Price County, 133 U. S. 496, and numerous other cases cited in the opinion.

The Supreme Court of California has so fully gone into the whole question and has reviewed the authorities with such ability and thoroughness that little can be added to support the conclusion reached by the court.

The essential facts, succinctly stated, are as follows:

1. The grant to the Southern Pacific Railroad Company, by section 18 of the Act of Congress of July 27, 1866, (14 Stat. 292), was of the public lands, not reserved, designated by alternate odd numbered sections for twenty miles on each side of the line of railroad, with a right to *select* indemnity *under the direction of the Secretary of the Interior* from the alternate sections of public land within a further limit of ten miles upon

each side, in lieu of losses within the place limits, of lands granted, reserved, sold, etc., prior to definite location. Section 6 of this act required the company to file a map of general route, and section 3 of the act required the company to file a map of definite location, as has been heretofore decided.

United States v. Southern Pacific, 146 U. S. 570, 597, 599.

Southern Pacific v. United States, 168 U. S. 1, 42.

The Southern Pacific Railroad Company, organized under the laws of California, at the time of the passage of this act, was authorized by its charter or articles to construct only a line of railroad *from the Bay of San Francisco, through the county of Los Angeles to the town of San Diego, and thence easterly to the Colorado river*, which fact appears from numerous decisions of the Secretary of the Interior in construing the acts of congress relating to the Southern Pacific Railroad Company, and in determining the purpose and object sought in subsequent legislation, as appears from the following decisions of the Secretaries of the Interior in Southern Pacific grant cases.

Secretary's letter of March 19, 1867;

Secretary's letter of November 2, 1869;

Secretary's letter of November 11, 1869;

Secretary's letter of May 9, 1873;

and the case of Southern Pacific Railroad, 25 Land Decisions, 223, 229.

As instructive upon this question, see also,

Southern Pacific Railroad v. United States, 98 Fed. Rep. 27, 39 (C. C. A.).

On *January 3, 1867*, the Southern Pacific filed in the Interior Department a map of its *general route* (Record 3), *showing the line of road from San Francisco down the San Joaquin valley to Mojave, and thence east to the Colorado river at Needles*, upon which a temporary withdrawal was made of the public lands within the thirty-mile limits, *but this withdrawal was set aside by subsequent orders of the Secretaries of the Interior, upon the ground that the grant by congress was to aid in the construction of a railroad upon the line described in the charter or articles of incorporation of the Southern Pacific Company, which was a line from San Francisco, through Los Angeles county to San Diego, and thence east, and not a line from San Francisco to Mojave, and thence east to Needles*, as appears from the various decisions of Secretaries of the Interior in their letters and decisions above referred to.

Thereupon further legislation was procured from the legislature of California, by the Southern Pacific by the Act of April 4, 1870, under which that company was authorized to amend its articles of incorporation and change the line of its road, so as to reach the *eastern* boundary of the state of California.

On June 28, 1870, the Southern Pacific Company procured the passage of the joint resolution of Congress of June 28, 1870, (16 Stat. 382) authorizing the company to construct its line of railroad "*as near as may be* on the route indicated by the map filed by said company in the Department of the Interior on the 3rd day of January, 1867", and granted to the company, to aid in such construction, the same amount of lands, and upon the

same terms and conditions, as had been granted by the Act of July 27, 1866.

This act of the California legislature and joint resolution of Congress of June 28, 1870, have been considered by the Court and the purposes of the act commented upon, in Southern Pacific Railroad Company v. United States, 168 U. S. 1, 27, 28.

The importance of this amendatory legislation by the legislature of California and by Congress, in enabling the Southern Pacific Company to construct its railroad *down the San Joaquin Valley to Mojave*, and thence east to Needles, becomes apparent, in view of the contention now made by the company that the purpose of the joint resolution of June 28, 1870, was to adopt the map of general route or preliminary location filed in 1867, upon that line of route, as a final and definite location by the company, upon which, as is claimed, the grant of lands attached at that time, and claiming that the purpose was not, as decided in numerous cases in the Interior Department above mentioned, and as shown by the legislation itself, to authorize the Southern Pacific Company to build a line of railroad upon a totally different route from that intended to be constructed in the original Act of July 27, 1866.

The Southern Pacific Company proceeded to construct the line of railroad authorized by the joint resolution of 1870, and actually completed that part of it from San Francisco to Tres Pinos, and from Alcalde to the Needles (Record 3), but never did complete or construct that part of the line of railroad between Tres Pinos and Alcalde (Record 3).

Southern Pacific Railroad, 25 L. D. 223, 229.

As the line of road of the Southern Pacific was definitely located and constructed, sectional maps of such definite location were filed in the Interior Department, and that section opposite to the land in suit was filed on or prior to November 8, 1889. (Record 3.)

On August 15, 1887, the Secretary of the Interior, after due notice to the company, revoked the order of withdrawal theretofore made of indemnity lands along the line of the Southern Pacific, and restored them to the public domain.

Atlantic & Pacific Railroad Case, 6 L. D. 84, 92, 93.

On September 15th, 1892, the United States patented this land to defendant Isaac T. Bell. (Record 5).

On July 26, 1893, the Southern Pacific Company made application to select the land as indemnity.

POINTS AND AUTHORITIES.

First.

The Act of Congress of July 27, 1866, as Amended by the Joint Resolution of June 28, 1870, Required of the Southern Pacific, Not Only a Map of General Route but one of Definite Location.

This court, in construing the act of July 27, 1866, has decided that section 6 of the act required a map of general route and that section 3 required a map of *definite location.*

United States v. Southern Pacific, 146 U. S. 570, 597, 599;

Southern Pacific v. United States, 168 U. S. 1, 42.

The court will take judicial notice of the decisions and orders of the Secretary of the Interior, of record in the Interior Department.

Heath v. Wallace, 138 U. S. 573, 587;
Jones v. United States, 137 U. S. 202;
Caha v. United States, 152 U. S. 211.

It is especially important that such judicial notice should be taken of the records of the Interior Department in a case like the present, which involves the construction of the joint resolution of congress of June 28, 1870, in order to determine what situation was presented in the Interior Department at that time which called for such legislation.

From the decision of the Interior Department, before referred, it appears that the purpose of that joint resolution was to authorize the Southern Pacific Company to construct a line of railroad from San Francisco, via Mojave to the Needles on the Colorado river, upon the *general route* described and shown by the map filed in the Interior Department on January 3, 1867, and that the grant was subject to all the terms and conditions which were prescribed by the act of July 27, 1866, one of which was to file a map of general route, another to file a map of definite location, and yet another to select such indemnity lands as it might be entitled to, under direction of the Secretary of the Interior.

It is obvious from the situation presented in 1870 and in view of the attempt of the Southern Pacific Company to secure a land grant upon a line not authorized by its charter or by the act of Congress, and which had been rejected by the Interior Department, that the

purpose in that joint resolution was not to dispense with the filing of a map of general route or of definite location, or to confirm to the Southern Pacific as a map of *definite location* the map of preliminary route which it had tendered in 1867, but was a *new grant* upon a *different route.*

In considering this very question the United States Circuit Court of Appeals for the Ninth Circuit, in United States v. Southern Pacific Railroad Company, 98 Fed. Rep. 27, 39, said:

"The Southern Pacific Railroad Company referred to in that section [Sec. 18 Act of July 27, 1886] was at that time authorized by its charter to build a railroad from San Francisco, through the counties of Santa Clara, Monterey, San Luis Obispo, Tulare, Los Angeles, and San Diego, to the town of San Diego, and thence eastward through the county of San Diego to the eastern line of the state; but that is a very different line of road from the one down the San Joaquin Valley, through the Tehachapi Pass, to Mojave, and thence eastward to the Needles, on the Colorado river, the authority for the building of which under its charter, wasnot obtained from the legislature of the state until April 4, 1870, and was not authorized by congress until June 28, 1870; and then the resolution of congress granting the the authority expressly provided for the saving and reserving of all the rights of actual settlers, together with the other conditions and resolutions provided for in the third section of the act of July 27, 1866."

It is settled by the decisions of this court that the route laid down in the charter or articles of incorporation of a railroad company is deemed to be read into the congressional act making a grant of lands or of right of way to the company, and it is presumed that congress had such line of route in view.

Railway Company v. Alling, 99 U. S., at page 474.

Washington Railroad v. Coeur d'Alene Railway, 160 U. S. 77, at page 99.

The general route of the Atlantic & Pacific Railroad, fixed in section 1 of the Act of July, 27, 1866, was upon or about the 35th parallel of north latitude, at the crossing of the Colorado, but in fact the line of road was definitely fixed to reach the Pacific Ocean at San Buenaventura, (United States v. Southern Pacific, 146 U. S. 570; Southern Pacific v. United States, 168 U. S. 1) and at that point the Southern Pacific would have intersected the Atlantic & Pacific Railroad upon the western boundary of the state, and upon the line fixed in its charter. The land grant attempted to be seized by that company, by way of Mojave to Needles was more than two hundred and fifty miles further in length than would have been, to have made the intersection at San Buenaventura, and of course it is a well settled principle that where the *termini* of a land grant road are fixed that the road must be constructed upon the shortest practicable route.

St. Paul R. v. Northern R., 139 U. S. 1; U. S. v. Northern R., 152 U. S. 284, 292.

For all these reasons it is obvious that the state and congressional legislation of 1870 conferred the first authority to construct by way of Mojave to Needles, and that the grant of lands along that line was a new and distinct one, and to aid in the construction of a wholly different line from that contemplated by the act of 1866, as decided by the Circuit Court of Appeals and by the Interior Department.

SECOND.

In Filing its Map of General Route on January 3, 1867, and Securing a Temporary Reservation at that Time, the Southern Pacific did not Acquire, by Virtue Thereof, any Right or Title to any Lands Along the Line.

New Orleans Railroad v. Parker, 143 U. S. 42, 57, 58;

United States v. Southern Pacific, 146 U. S. 570, 599, 600;

Southern Pacific v. United States, 168 U. S. 1, 41, 42;

United States v. Oregon Railroad, 176 U. S. 28.

The act of Congress, under which the Southern Pacific claims title, does not provide that any title or right shall vest in the company prior to definite location of the road, but fixes the time of filing that map as the time when its grant to lands in place shall attach, and requires the company to *select* indemnity lands to which it may be entitled, under the direction of the Secretary of Interior.

In requiring the company to file a map of general route by section 6 of the act, there is no provision whatever for the withdrawal of the lands within the indemnity limits, and certainly no provision granting any title prior to definite location.

Obviously the requirement that the company should file a map of general route was not wholly for the benefit of the company, but to protect the public as well, and to inform the Land Department of the general route of the road, prior to definite location. Even if this section had required a withdrawal of lands that would not pass title to the company, in view of the express

requirement of section 3 of the act that the company should file a map of definite location and that title should pass only at that time.

THIRD.

Until Selection of Indemnity Land has been Made by the Company, Approved by the Secretary of the Interior, no Right or Title Passes to the Company.

Wisconsin Central Railroad v. Price County, 133 U. S. 496, 511, 512;

Ryan v. Railroad Company, 99 U. S. 382, p. 386;

St. Paul Railroad v. Winona Railroad, 112 U. S. 720, p. 731.

Sioux City Railroad v. Chicago Railroad, 117 U. S. 406, p. 408;

Barney v. Winona Railroad, 117 U. S. 228, p. 232;

Cedar Rapids Railroad v. Herring, 110 U. S. 27, pp. 41, 42;

United States v. Missouri Railroad, 141, U. S. 358, p. 374;

New Orleans Railroad v. Parker, 143 U. S. 42, pp. 57, 58;

Southern Pacific Railroad v. Wood, 124 Cal. 475, 481;

Moore v. Carmode (S. C. Wash.), 55 Pac. Rep. 217.

The settled doctrine of the court upon this question which was applied in Wisconsin Railroad v. Price county, *supra*, 133 U. S. 496, 511, 512, is there expressed by the court in the following language:

"But as to the remainder of the lands taxed, which fell within the indemnity limits, the case is different. For such lands no title could pass to the company not only until the selections were made by the agents of the state appointed by the governor, but until such selections were approved by the Secretary of the Interior. The agent of the state made the selections, and they had been properly authenticated and forwarded to the Secretary of the Interior. But that officer never approved of them. Nor can such approval be inferred from his not formally rejecting them. * * * The approval of the secretary was essential to the efficacy of the selections, and to give to the company any title to the lands selected. His action in that matter was not ministerial but judicial. He was required to determine in the first place, whether there were any deficiencies in the land granted to the company which were to be supplied from indemnity lands, and in the second place, whether the particular indemnity lands selected could be properly taken for those deficiencies. In order to reach a proper conclusion on these two questions, he had also to inquire and determine whether any lands in the place limits had been previously disposed of by the government, or whether any preemption or homestead rights had attached before the line of the road was definitely fixed. There could be no indemnity unless a loss was established. and in determining whether a particular selection could be taken as indemnity for the losses sustained, he was obliged to inquire into the condition of those indemnity lands, and determine whether or not any portion of them had been appropriated for any other purpose, and if so what portion had been thus appropriated, and what portion still remained. This action of the secretary was required, not merely as supervisory of the action of the agent of the State, but for the protection of the United States against an improper appropriation of their lands. Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until then the lands which might be taken as

indemnity were incapable of identification; the proposed selections remained the property of the United States."

In harmony with these decisions of the court is a long line of decisions of the Interior Department, running through a series of many years, uniformly holding that no right or title to any particular tract of indemnity land passes until it has been selected and approved, and until which time the land is open to disposal by the Land Department.

Brady v. S. P. R. R. Co., 5 L. D. 658;
Secretary Lamar to President, 6 L. D. 77;
Atlantic and Pacific R. R. Co., 6 L. D. 84, 85;
N. P. R. R. Co. v. Miller, 7 L. D. 100;
S. P. R. R. Co. v. Meyer, 9 L. D. 250;
N. P. R. R. Co. v. Walters 13 L. D. 230.
S. P. R. R. Co. v. Wasgatt, 13 L. D. 145;
S. P. R. R. Co. v. McWharter, 14 L. D. 610;
S. P. R. R. Co. v. Waters, 17 L. D. 270;
S. P. R. R. Co. 18 L. D. 314;
S. P. R. R. Co. v. McMahon, 21 L. D. 402;
N. P. R. R. Co. v. Lillethun, 21 L. D. 487,
S. P. R. R. Co. v. McKinley, 22 L. D. 493;
S. P. R. R. Co. v. Kanawyer, 23 L. D. 500;
N. P. R. R. Co. v. Ayers, 24 L. D. 40;
S. P. R. R. Co. (joint resolution of 1870) 25 L. D. 223;
S. P. R. R. Co. v. Davis, 26 L. D. 595;
N. P. R. R. Co. v. Gunther, 26 L. D. 340;
Lund v. N. P. R. R. Co., 27 L. D. 348;
N. P. R. R. Co. v. Blain, 27 L. D. 361;
State of California v. S. P. R. R. Co., 27 L. D. 542;

Upon well settled principles this uniform construction of these laws by the Interior Department should not be overturned, unless clearly wrong.

FOURTH.

When the Selection has Been Approved by the Secretary of the Interior the Equitable Title Passes to the Company, but Only When Patent is Issued, Under the Provisions of Section Four of the Act of July 27, 1866, Does the Full Legal Title Pass, and Until Patented the Land is Within the Control of the Interior Department.

It is required by the act of July 27, 1866, (Section 4) as well as by the amendatory act or resolution of June, 28, 1870, that the title to lands earned by the company shall pass by the issuance of a patent.

The patent of the United States is the solemn instrument provided by law as complete evidence of the performance of all conditions by the patentee, and as a determination of all *facts* favorable to the patentee which are required to be established as antecedent to its issuance and is full and complete evidence of the passing of the legal title.

It is the settled doctrine in the disposal of the public lands that where a patent is required or contemplated the legal title and control of the land can not pass from the Land Department without its issuance, as there are many questions of fact to be determined by the Land Department, which has exclusive jurisdiction of such matters, and many matters of discretion are involved.

In Barden v. Northern Pacific Railroad, 154 U. S. 288, 327, the Court said:

"It is the established doctrine, expressed in numerous decisions of this court, that wherever Congress has provided for the disposition of any portion of the public lands of a particular character, and authorizes the officers of the Land Department to issue a patent for such land upon ascertainment of certain facts, that department has jurisdection to inquire into and determine as to the existence of such facts, and in the absence of fraud, imposition, or mistake, its determination is conclusive against collateral attack"

And in applying the principle, the court held that the determination as to the mineral character of lands was vested exclusively in the Land Department.

In Wisconsin Railroad vs. Price County, 133 U. S. 496, it was distinctly decided, upon a full review of the authorities, that in the matter of the selection of railroad indemnity lands there were antecedent facts to be determined by the Land Department and judicial discretion to be exercised by the Secretary of Interior, and, it is necessary for the Land Department to determine whether such a loss has been made in place limits as authorized the selection of indemnity, whether the land sought to be selected is open to be taken as such indemnity, and whether it is of the character of land which the company might select, and it might be added that it must be determined whether the applications to select are in due form, whether the land is mineral land, swamp land, coal land, or whether it is otherwise public agricultural land subject to selection. These, as well as numerous other antecedent questions must be determined by some tribunal, and if not by the Interior

Department, then by whom? It can not be possible that these questions can be determined by the railroad company in its own favor, and its judgment enforced by legal proceedings in the courts.

In Michigan Land Company v. Rust, 168 U. S. 589, 592, it was adjudged that under the swamp land act of 1850, which provided for a listing of the land, to be approved by the Interior Department, and a patent in due form of law, that even after the land had been listed and certified, that the Interior Department had the power to review the proceedings, cancel the listing and patent the land to another under a later entry.

In Brown v. Hitchcock, 173 U. S. 473, which also arose under the swamp land act, it was held that the legal title did not pass until patent issued, and that all questions of fact and proceedings were open to review and reconsideration in the Interior Department, prior to issuance of patent.

In Rogers Locomotive Works v. American Emigrant Company, 164 U. S. 559, 574, it was adjudged that lands claimed under the swamp land grant of 1850, which were included in a list certified to the state under a railroad grant, that such certification was a conclusive determination by the Interior Department of the non-swamp character of the land.

In the very recent case of Hawley v. Diller, 178 U. S. decided May 28, 1900, it was held that even after entry and final proof of a tract of land under the timber and stone act, that the Land Department had the power to cancel the entry and issue a patent to another under a different entry.

From these authorities it can not be reasonably doubted that the Land Department is a special tribunal clothed at least with quasi-judical powers, having exclusive jurisdiction and control of the public lands, and that its determination of all questions of fact is conclusive, and that it may exercise wide discretion as to other matters preliminary to the issuance of patent.

Such being the law, it is submitted that until the selection of the Southern Pacific had been approved prior to a disposal of this land for other purposes or to another, that no right or title was vested in the company, and that when so approved, equitable title would pass, subject to be cancelled or annulled by the Interior Department, upon reasonable or proper grounds, and that only when patent issues can the company acquire a full legal title.

As this tract of land was patented to defendant Bell long before the company even applied to select the land, it is submitted that no right or title is vested in the company.

FIFTH.

The Facts Found by the Land Department Upon the Issuance of the Patent to Defendant Bell are Conclusive Against the Southern Pacific

Authorities *supra*.

Also,

Steel v. Smelting Company, 106 U. S. 447, 457;

Lee v. Johnson, 116 U. S. 48;

Heath v. Wallace, 138 U. S. 573, 585;

United States v. Marshal Company, 129 U. S. 579, 588;

Russell v. Maxwell Land Grant Company, 158 U. S. 253;

In conclusion, it is submitted that the judgment of the Supreme Court of California should be affirmed.

JOSEPH H. CALL,
Counsel for Defendant in Error.

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OCTOBER TERM, 1901.

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Southern Pacific Railroad Company,
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Defendant in Error.

Additional Brief for Defendant in Error.

The Controlling Principle in this Case, Namely, that there was no Authority to Withdraw the Indemnity Lands, as Against Homestead and Pre-emption Entries, and that Patents Issued to Settlers Under Such Entries are Valid, has been Lately Presented and Fully Determined by the Court Adversely to the Contentions of the Plaintiff in Error in the Present Case.

In the following cases, fully argued, submitted and determined, and opinions filed on January 7, 1901, it was decided by the court in construing the grant to the Northern Pacific Railroad Company [Act of Congress, July 2, 1864, 13 Stat. at L. 365, chapter 217], which is identical with the grant to the Southern Pacific and Atlantic and Pacific Railroads of July 27, 1866 [14 Stat. at L. 292]:

1. That the act did not provide for a withdrawal or reservation of indemnity lands;

2. That the Secretary of the Interior was not authorized to reserve the indemnity lands from homestead and pre-emption entries;

3. That patents issued to settlers, under the homestead and pre-emption laws, within such indemnity limits, based upon entries made prior to a selection by the railroad company, approved by the Interior Department, were valid, as conveyances of the land against the railroad title.

See:

Hewitt v. Schultz, 180 U. S. 139;
Moore v. Cormode, 180 U. S. 167;
Powers v. Slaght, 180 U. S. 173;
Moore v. Stone, 180 U. S. 180.

These recent and carefully considered decisions of the court upon these vital questions, which fully control the issues in the present suit, render it unnecessary to further argue them, as the contentions now made were there fully presented and denied by the court.

As the government had the right and power to patent the tract of land in suit to the defendant, *under either the homestead or pre-emption law*, it must be presumed, nothing appearing to the contrary, that the patent to Bell was upon either a homestead or pre-emption entry, for every intendment and presumption is in favor of the patent.

See cases cited at pages 20 and 21 of the brief for defendant in error.

JOSEPH H. CALL,
Counsel for Defendant in Error.